3. New Trial (§ 104 (2)*)—Newly Discovered Evidence—Cumulative Evidence.—The testimony as to plaintiff's removal of the goods, being of a different character and more specific and concrete than that offered by defendant at trial, cannot be treated as cumulative evidence, not warranting a new trial.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 449.]

4. New Trial (§ 105*)—Newly Discovered Evidence—Admissions of Party—Testimony.—The newly discovered testimony as to the admissions of plaintiff was independent evidence, and not cumulative, and warranted a new trial, though it impeached plaintiff's testimony given at the former trial.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 449.]

5. New Trial (§ 108 (2)*)—Newly Discovered Evidence—Sufficiency.—In such case the newly discovered evidence, particularly as some of the witnesses were free from any interest in the case, was such as would probably produce a different result on a new trial, and warranted the granting thereof.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 449.]

Error to Circuit Court, Wise County.

Action by Antonio Kator against George W. Barsa. There was a verdict for plaintiff, and his motion for new trial being overruled, and judgment rendered in accordance with the verdict, defendant brings error. Reversed.

R. T. Irvine, of Big Stone Gap, for plaintiff in error.

Vicars & Peery, of Wise, and *Morton & Parker,* of Appalachia, for defendant in error.

ROBINETT *v.* TAYLOR et al.

Sept. 20, 1917.

[92 S. E. 616.]

1. Wills (§ 449*)—Presumption—Partial Intestacy.—There is a presumption against partial intestacy.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 787.]

2. Wills (§ 449*)—Construction—Interest—Devise—"Property."—Testator, after devising lands to his three sons, devised land to his daughter for life, remainder to her heirs, and then directed that the parcel on which he resided should be rented and the proceeds applied to the support of his wife and two daughters, that at the death of his wife the land should be sold, and that two named sons should have an option to purchase the parcel at $1,800, and in event of their failure to exercise the option, the land should be sold to the highest bidder. The testator directed that after payment of his debts that all debts due him should be collected and property sold, the re-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

mainder to be equally divided among all the heirs except one daughter, who should have $200 paid her, so that her husband could not dissipate it, and that certain named daughters should receive $200 each more than the sons. Held, that testator did not, as to the place on which he resided, die intestate, and the married daughter to whom payment of $200 was directed to be made took no interest therein, but the named sons had an option of purchasing the property, and in the event of their failure, it was to be sold and the proceeds divided, the land being included in the direction for the sale of property.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 787, 796.]

3. Witnesses (§ 144 (6)*)—Competency—Deceased Persons.—Defendant who contends that he has purchased the interest of a decedent in his father's estate, is an incompetent witness to that fact.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 941.]

4. Descent and Distribution (§ 87*)—Purchaser from Heirs—Rights.—A testator who directed a portion of his lands sold gave his sons an option to purchase at a fixed price. Defendant acquired the interest of the sons, but, thinking that he had acquired interest of all the heirs who were to share in the division of the estate, he did not exercise the option. Held, that where by reason of the death of one of the heirs defendant was not able to prove the purchase of his interest, he should not, having removed timber from the premises, be charged with waste, and the representatives of the heirs of such deceased heir are entitled only to recover such heir's proportionate share of the sum which would have been realized had the option been exercised.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 588.]

5. Pleading (§ 291 (2)*)—Proof—Admission.—Where the execution and delivery of a title bond set up by defendant was not questioned, proof of those facts was, under Code 1904, § 3279, unnecessary.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 410.]

6. Accord and Satisfaction (§ 7 (1)*)—Part Performance—Sales—Conditions.—Where two of the testator's sons had an option to purchase land at a fixed price and the other heirs sold their interest to defendant, who acquired the interest of the two sons having the option, representatives of such heirs cannot, under Code 1904, § 2858, declaring that part performance of an obligation when expressly accepted by the creditor shall extinguish such obligation, compel a sale of the land on the theory that they sold their interest on condition that the option should be exercised.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 8.]

7. Witnesses (§ 159 (13)*)—Competency—Transactions with De-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

ceased Persons.—Where defendant claimed that he purchased a deceased heir's interest in an estate, but was incompetent to testify to that fact, he should be given an opportunity to show what payments had been made on the purchase, and they should be deducted from recovery on behalf of such deceased heir.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 941.]

Appeal from Circuit Court, Scott County.

Bill by E. L. Taylor and others against Ira P. Robinett, who cross-complained. From the decree, defendant appeals. Reversed.

S. H. Bond and *Coleman & Carter,* all of Gate City, for appellant.

W. S. Cox, of Gate City, for appellees.

ROBERTS *v.* HAGAN.

Sept. 20, 1917.

[93 S. E. 619.]

1. Injunctions (§§ 36 (2), 37*)—Relief to Purchaser of Land—Defective Title.—To entitle a purchaser of real estate to relief in equity against the collection of the purchase money on the ground of defective title, the sale having been consummated by execution and acceptance of a general warranty deed without other covenants, the title must be questioned by a suit either prosecuted or threatened, or it must be clearly shown that the title is defective.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 594.]

2. Injunction (§ 30 (2)*)—Relief to Purchaser of Land—Defective Title.—Where the vendor of land derived his claim thereto from the heirs of a decedent, uncertainty about the existence of such decedent's will, and about its provisions if it did exist, did not constitute such clear defect in the title as to afford the successor of the purchaser ground for relief against payment of the purchase money, he having assumed payment of the vendor's lien, it being safe to assume that the provisions of the will, if one was made, were as alleged in the vendor's partition suit against certain heirs; the vendor having acquired the interests of the other heirs.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 594.]

3. Insane Persons (§ 71*)—Sale of Land—Collateral Attack.—Sale of an alleged insane person's interest in a decedent's lands in a partition suit on petition of her brother who claimed to be her committee, the evidence of his appointment as such being unsatisfactory, and the evidence of her insanity being insufficient, while the proceedings were wanting in some of the jurisdictional requirements

---

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.